



The Teacher: Napoleon's Police
Chief, Joseph Fouche

By now, [Peter Gleick's ethical indiscretions concerning the Heartland Institute](#) are [old news](#). But for lawyers, they raise particularly interesting ethical issues because they highlight the question of really, whether there were ethical barriers broached at all.

I initially thought that this was obviously the case: someone in my profession would get disbarred for doing something similar, I assumed. But actually, it is somewhat murkier than that.

Consider the issue of fair housing enforcement. There, the gold standard of research is so-called "paired testing," where one couple — traditionally Black — walks into the landlord's or realtor's office asking about houses or apartments, and then a white couple with similar (or often worse) financial and credit scores does the same. They are masquerading as someone whom they are not in an attempt to find out what the target "really" thinks. That is basically what Gleick did.

A few years ago, in [Formal Ethics Opinion 01-422](#) (2001), the American Bar Association explicitly approved the use of secret recording, overturning an opinion from 1974. It noted that secret recording of conversations is now an accepted practice by law enforcement, private investigators and journalists. Moreover, it said, courts routinely admit evidence obtained through secret recordings. This is not precisely on point, because obviously secret recording is different from masquerading. But it is not clear which one is worse, and both involved deception. In any event, the ABA endorsed secret recording because forbidding it would prevent "legitimate and necessary activity (e.g., documenting criminal threats, protecting against witness perjury, use of testers in discrimination and quasi-governmental investigations)."

Two differences stand out from these examples, one of which seems to be a distraction and the other of which really serves as the touchstone of the matter.



The Student: Professor Peter
Gleick

The first difference that whereas paired testers and confidential informants deceive in order to achieve their ends, they do not actually claim to be another real person. This is true, but for the purposes here, I fail to grasp the relevance. It is true that masquerading as someone

else involves a deeper threat to that person, but that isn't what made the Gleick episode problematic. No one seriously is accusing Gleick of committing identity theft.

The second difference is more important. The ethics opinions seem to suggest that prosecutors and paired testers can use their deceptive tactics because they are necessary to achieve a very compelling social function, i.e. prosecuting crime and ferreting out discrimination, and that there is no way anywhere close as good to doing it.

That just wasn't the case with Heartland. Climate denial is a blot on the American body politic and to reasoned discourse, but you don't need to get confidential documents in order to discredit it. When I saw what Heartland was doing, I wasn't particularly surprised. No one found some nefarious purpose at Heartland: they found a bunch of insane wingnuts. We knew that already. Besides, one thing that makes scientific inquiry useful is that it is public and reproducible. Although it is frustrating to have to knock every crazy theory that climate denialists make, science has a way of doing that already.

So the real problem with what Gleick did was not that it was deceptive, but rather that it was deceptive without having a good enough reason for doing so. That is related to the initial outcry, but far less serious.

One cannot help remembering the delicious quote from [Joseph Fouche](#), Napoleon's chief of police, about the extrajudicial execution of the Duke of Enghien:

It was worse than a crime. It was a blunder!

That would be a fitting epitaph for *L'Affaire Heartland*.